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October 8, 2021

Via Email & US Mail to:

Montana Department of Labor & Industry
Employment Relations Division
Attn: Tracy Gonzalez,
P.O. Box 8011
Helena, Montana 59604

tgonzalez2@mt.gov

RE: **MAR Notice 24-35-376 – Proposed Rulemaking**

Dear Ms. Gonzalez:

On behalf of the Montana Contractors Association (“MCA”) and the Montana Contractors Compensation Fund (“MCCF”) we submit the following comments to proposed rulemaking amending ARM 24.11.2407 and 24.35.203 and the adoption of New Rule I pertaining to independent contractors as published in the Montana Administrative Register, Notice No. 24-35-376 (hereinafter referred to as the “Proposed Rule”).

In general, the MCA and the MCCF do not believe the Proposed Rule comports with the intention or the plain language of SB 367 passed and approved by the 2021 Montana Legislative Session.

It is clear the purpose of SB 367 was to ensure that an employment relationship was not presumed by the lack of an Independent Contractor Exemption Certificate. To accomplish this, SB 367 added the following language to existing Montana statute:

“An individual may not be determined to be an employee based solely on not having an independent contractor exemption certificate.”

[See SB 367 (2021), Section 1].

The Proposed Rule appears to focus solely on Section 2 of SB 367 and neglects to address the clear intent of the Legislature as presented in Section 1 of SB 367. We appreciate the Department’s work with respect to fraudulent representation of an Independent Contractor Exemption Certificate, however, the remainder of the Proposed Rule runs afoul of specific statutory language in Section 1 of SB 367. Specifically, ARM 2.35.203 in the Proposed Rule


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still specifically provides that failure of a worker to obtain an Independent Contractor Exemption Certificate conclusively determines that worker to be an employee.

As a result, we respectfully request the Dept. of Labor and Industry to either redraft the rules in conformance with the language in SB 367, or in the alternative, work with stakeholders to propose different language that does not conclusively establish a worker as an employee if that worker lacks an Independent Contractor Exemption Certificate.

Sincerely,

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By 
Steven T. Wade
Brian P. Thompson